

Legal Changes of January 2021

Voicu & Filipescu is a full service law firm, covering all legal areas relevant to your company's activity. This issue of our monthly newsletter provides you with a brief description of some of the recent legal amendments in:

- Data Protection
- Employment
- Litigation & Arbitration
- Public Procurement

+ VF News

The dedicated VF task force addressing Coronavirus (COVID-19) concerns continues to be active in providing legal solutions and strategies for the benefit of companies impacted by the health crisis. [Read more here.](#)

Legal500 EMEA 2020 edition recommends Voicu & Filipescu for our lawyers' activity in 6 practice areas: Corporate, Commercial and M & A, Employment, PPP and Procurement, Real Estate and Construction, Restructuring and Insolvency and TMT.

IFLR 1000, 2020 edition recommends Voicu & Filipescu for our lawyer's activity in three practice areas: M&A, Banking and Finance and Project Development. Also, Mr. Dumitru Rusu – Partner, head of the Banking and Finance practice, was selected as a *Highly Regarded Lawyer* for the practice areas of Capital Markets and Banking.

data protection - legal changes published in January 2021

I. EUROPEAN UNION – regulations

1. Forty-fifth Plenary Session of the European Data Protection Board

The following documents were mainly adopted during the Plenary of the European Data Protection Committee, held online on 14 January 2021:

- [Guidelines 01/2021 on Examples regarding Data Breach Notification;](#)
- Guide on the application of art. 62 GDPR (on joint operations of national supervisory authorities);
- Joint opinion of EDPB and EDPS regarding the implementation of the draft European Commission Decision on the standard contractual clauses between the controller and the processor (reported in art. 28 para. 7 of the GDPR);
- Joint opinion no. 1/2020 of the EDPB and EDPS regarding the standard contractual clauses for transfer to third countries;

In this context, we note that the main documents adopted at the previous Plenary in December consisted of:

- Guidelines 10/2020 on restrictions under Article 23 GDPR - version for public consultation;
- Guide no. 2/2020 regarding the application of art. 46 para. (2) letter a) and art. 46 para. (3) lit. b) regarding the transfer of personal data to public authorities from third countries;
- Guide no. 6/2020 on the interaction between the Second Payment Services Directive and the GDPR.

More information is available at: https://edpb.europa.eu/news/news_en.

II. EUROPEAN UNION - sanctions

1. The Polish authority fined Smart Cities Euro 3,000 for failure to cooperate with the Authority

The Polish authority imposed a fine of more than EUR 3,000 on Smart Cities in Warsaw for failing to cooperate with the Authority by failing to respond to its letter and providing access to personal data and other information necessary for the performance of its tasks.

2. The Belgian authority imposed to Family Service a fine of EUR 50,000

The Authority imposed a fine of EUROS 50,000 on Family Service, which distributes "pink boxes" well known to future mothers and fathers in Belgium. The authority launched an investigation into the company after a complaint was filed

alleging that the company transferred personal data to third parties, including data brokers, without valid consent from the customer and without providing sufficient information.

3. The Italian authority requested Facebook and Instagram information about the processing of personal data on the 2 social networks

The authority is stepping up its efforts to protect children who use social networks, following the case of the 10-year-old girl from Palermo and the limitation of TikTok processing. The investigations were started regarding the processing by Facebook and Instagram.

More importantly, specific information was requested on existing registration mechanisms and age verification methods applied by both social networks to verify compliance with the age threshold for registration. Replies from Facebook are expected within 15 days.

4. The Lower Saxony Authority fined notebooksbilliger.de AG with a fine of EUR 10.4 million for video surveillance of employees

The Data Protection Authority of Lower Saxony imposed **a fine of EUR 10.4 million against notebooksbilliger.de AG**. The company used **video surveillance to monitor its employees for at least two years** without any legal justification. Some of the areas registered by the illegal rooms included workspaces, sales floors, warehouses and staff rooms.

The company claimed that video cameras were installed to prevent and investigate crimes and to track the flow of goods into warehouses. However, in order to prevent theft, a company must first implement less severe means (e.g., random baggage checks on leaving the company headquarters). In addition, video surveillance can only be used to investigate crimes, if certain persons are reasonably suspected of having committed such offenses. In this case, the company may be allowed to monitor people with cameras for a limited period. However, notebooksbilliger.de did not limit its video surveillance to certain employees or to a certain period. In addition, many of the records were saved for 60 days, which is much longer than necessary.

5. The Danish authority issued a warning to a supermarket using facial recognition technology

The Dutch Data Protection Authority has issued an **official warning** to a supermarket for **the use of facial recognition technology**. Although facial recognition technology has been disabled since December 2019, the supermarket wanted to restart it.

The supermarket claims to have used facial recognition technology to protect its customers and staff and to prevent shoplifting. The technology was connected to the rooms at the entrance to the store. The technology scanned the faces of everyone who entered the store and compared it to a database of people who were denied access to stores. The faces of the people who had not been banned were erased after a few seconds.

Following media reports, on December 6, 2019, the Authority requested information from the supermarket owner. On December 8, 2019, the supermarket turned off facial recognition technology. However, the owner indicated in the documents provided to the Authority that he wished to restart it but was refused.

6. The Polish authority fined the university for the lack of data breach notifications

The President of the Authority for the Protection of Personal Data imposed **a fine of more than EUR 5,850** on the Medical University of Silesia, as there was a breach of data protection at the university, which the controller should notify not only the supervisory authority but also the persons affected. of incident.

The students were identified during the exams held at the end of May 2020 through video conferences. After the examination, **the records were made available** not only to the persons examined but also to **others who had access to the system**. Furthermore, by using a direct link, any third party could have access to the examination records and the personal data of the examined students were presented during the identification.

7. The Polish authority fined ID Finance Poland a fine of EUR 250,000

The punished company (owner of a loan platform MoneyMan.pl) **did not respond adequately to the signal about its security gaps**. He did not check the information quickly enough that his client data was available on one of his servers. Such a notification was not taken seriously, so a few days after the company received the signal, an unauthorized person copied the data and then deleted it from the server. The person requested a ransom for the return of the stolen information. Only then did the company start analyzing the security features on its servers and notified the data breach to the supervisory authority at the same time.

8. The Polish authority fined the insurance company WARTA S.A. with a fine in the amount of 20,000 Euros

The insurance and reinsurance company WARTA S.A. was **fined EUR 20,000 for failing to notify the Authority of a personal data breach**. In May 2020, the Authority received information from a third party about the personal data breach which consisted in sending by e-mail an insurance policy by an insurance agent, being a processor for WARTA SA Insurance and Reinsurance Company, to an unauthorized recipient.

The attached document contained personal data, including name, surname, residence addresses, PESEL numbers (personal identification numbers) and information on the object of insurance (car). What is important in this case is that the supervisory authority has been informed of the breach of personal data by an unauthorized recipient who has come into possession of documents not intended for it and the confidentiality of the persons concerned has been infringed.

9. The Polish authority fined Virgin Mobile Polska with a fine of EUR 460,000

The Authority imposed a fine of EUR 460,000 on Virgin Mobile Polska for failure to take appropriate technical and organizational measures to ensure the security of the data processed. The Authority stated that the company violated the principles of confidentiality and accountability of the data specified in the GDPR. Virgin Mobile has not performed periodic and comprehensive tests, measurements and evaluations of the effectiveness of the technical and organizational measures applied to ensure the security of the processed data. Activities in this regard were undertaken only when there were suspicions of vulnerability or in connection with organizational changes. Furthermore, no tests were performed to verify the guarantees related to the transfer of data between applications related to the service of prepaid service buyers. In addition, the vulnerability associated with exchanging data in these systems was used by an unauthorized person to obtain data from some of the company's customers.

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In connection with a data breach, as a result of which an unauthorized person obtained data from customers in one of the databases, the Authority carried out the inspection at the company. As a result of the irregularities found, the Authority initiated administrative proceedings culminating in the imposition of a fine.

employment - legal changes published in January 2021

Order of the National Agency for Employment no. 2/2021 for the approval of the Procedure for granting the amounts provided by art. 1 para. (1) of the Government Emergency Ordinance no. 220/2020 on the application of social protection measures after January 1, 2021 in the context of the spread of SARS-CoV-2 coronavirus, as well as for the amendment of some normative acts was published in the Official Gazette, Part I no. 17 of January 7, 2021, entering into force on the same date.

The Order approved the procedure by which employers can benefit monthly, for a period of 12 months, from an amount representing 50% of the employee's salary, but not more than Lei 2,500 (for each employee in the following categories), if during the period January 1 - September 1, 2021, hire for an indefinite period, full-time: **(i)** persons over the age of 50 whose employment has ceased for reasons not attributable to them, during the state of emergency or alert, or **(ii)** persons aged between 16 and 29 registered as unemployed in the records of the employment agencies, or **(iii)** Romanian citizens, included in the same age categories, whose employment relationships ceased in 2020 with foreign employers on the territory of other states, for reasons not attributable to them, by dismissal.

In order to benefit from this support, the employers must conclude an agreement with the competent employment agencies by **September 1, 2021** (this being a mandatory time-limit to comply with for receiving the support), the template of which is provided in Annex 1 to the Order.

For concluding the agreement, the employers must submit by electronic means, following the possession of a qualified certificate (issued under the Law no. 455/2001 on electronic signature), an application (according to the template set out in Annex 2 to the Order), together with: **a)** a statement on its own responsibility, given by the legal representative, showing that the company is not in one of the situations in which the support cannot be granted, according to the template provided in Annex 3 to the Order; **b)** the identity documents of the persons employed in the categories provided above, in copy (certified for conformity with the original); **c)** the documents based on which the persons from the categories provided above were employed, in copy (certified with the original).

According to the Procedure, the amounts are granted to the employers on a monthly basis, from the date of concluding the agreement, in proportion to the actual time worked in that month by the persons employed under the conditions provided above. These amounts are also granted for the rest leave period. However, during the period in which the employment relationships of the persons covered by the convention are suspended, the amounts shall not be granted.

For the verification and settlement of the monthly amounts, the employers must submit by the 25th of the month following the month for which they request these amounts, by electronic means, to the employment agencies, a nominal table prepared according to the template provided in Annex 4 to the Order, together with the timesheet and payroll for that month signed by the employees, provided in certified copy by the employer (for conformity with the original) or, if the payment of the salary is made by transfer to a bank account, together with the timesheet and payroll for that month, as well as the salary payment orders and the related account statements, in certified copy by the employer for compliance with the original.

Government Decision no. 3/2021 regarding the extension of the state of alert on the Romanian territory starting with January 13, 2021, as well as the establishment of the measures applied during it to prevent and combat the effects of the COVID-19 pandemic was published in the Official Gazette, Part I no. 36 of January 12, 2021, entering into force on the same date.

According to the Decision, it was established that starting with January 13, 2021, the state of alert will be extended for another 30 days on the entire territory of the country.

The Decision maintains the obligation to wear a protective mask in public spaces, commercial spaces, means of public transport and at the workplace.

Also, for all public or private institutions and economic operators, the obligation to decide the organization of work to working from home or teleworking regime is maintained, where the specificity of the activity allows, under the conditions of art. 108-110 of the Labour Code, as well as those established by the Law no. 81/2018 on teleworking activity.

In the situation where the employee cannot work in teleworking or work from home regime, in case there are more than 50 employees, the employers have the obligation to organize the work schedule so that the staff is divided into groups to start or end the activity at a difference of at least one hour.

Government Decision no. 4/2021 for establishing the minimum gross basic salary per country guaranteed in payment was published in the Official Gazette, Part I no. 40 of January 13, 2021, entering into force on the same date.

By this Decision, the minimum gross basic salary per country was increased from Lei 2,230 to Lei 2,300 per month, starting with the date of entry into force of the normative act, namely January 13, 2021. This new level of the minimum gross basic salary per country was established for a normal work schedule of an average of 169,333 hours per month, representing Lei 13,583/ hour.

For the staff hired in positions for which the level of higher education is required, with at least one year's seniority in higher education, the minimum gross basic salary in the country guaranteed in payment, excluding bonuses and other allowances, shall be set at the amount of Lei 2,350 per month, for a normal work schedule of 169,333 hours on average per month, representing Lei 13,878 lei/ hour.

Decision of the High Court of Cassation and Justice no. 30/2020 regarding the examination of the appeal in the interest of the law formulated by the Ombudsman regarding a legal issue was published in the Official Gazette no. 68 of January 21, 2021, being applicable starting with the same date.

The High Court of Cassation and Justice was invested with the claim formulated by the Ombudsman regarding the settlement of the appeal in the interest of the law in connection with the phrase "real and serious cause" from the provisions of art. 65 of the Labour Code in the sense of establishing, „*if a serious character of the dismissal implies that, in case of reduction of the number of identical positions within the unit, the employer must apply some criteria of preference/*

selection, to justify the choice of employee/ employees to be fired from a number of employees carrying out identical or similar activities”.

The courts have given different or contradictory solutions to the same issue of law.

Thus, a first case-law considers that:

- the employer is not obliged to indicate in the dismissal decision the economic analysis underlying the adoption of the dismissal measure, the future development strategy, nor to prove the efficiency of the organization/ reorganization measures, these representing its exclusive attribute;
- the courts are not called to assess on the economic activity nor on the measures of organization and functioning of the unit led by the employer, these being matters of opportunity;
- the employer is not required to apply or indicate in the dismissal decision selection criteria between similar positions, this obligation remaining only in the case of collective dismissals;
- the courts cannot impose a certain selection criterion on the employer.

A second case-law considers that:

- the employer must indicate in the dismissal decision the selection criteria between identical/ similar positions;
- these criteria must be objective and verifiable and not conceal subjective criteria, foreign to the legal case of dismissal;
- the objective criteria must pre-exist at the moment of initiating the dismissal procedure, to be provided in internal documents of the employing unit, to be known by the employee and opposable to him/ her.

The High Court considered that the issue at the origin of the appeal in the interest of the law does not start from the insufficiency or the ambiguity of art. 65 of the Labour Code, since all the courts started logically and similarly from the premises of the legal text in question. Thus, all the courts consider the analysis of the conditions imposed by art. 65 para. (2) of the Labour Code, respectively the effectiveness of the cancellation of the position(s), as well as the real and serious cause underlying this measure.

The discrepancy arises, in fact, when determining the real and serious nature of the cause of cancellation of the job(s), a stage of argumentation in which some courts feel the need to indicate criteria for selection in the dismissal decision, and other courts consider the employer to be sovereign, therefore exempted from the obligation to apply and indicate such criteria, which also excludes the obligation of the court to examine them. However, this aspect is not related to the interpretation of art. 65 of the Labour Code, but of the way in which the condition regarding the "real and serious cause", provided in the second paragraph of this article, is and must be evaluated concretely, related to the specifics of the case, which reveals a problem of application of the legal text to the circumstances of the case, not a problem of interpretation of the legal text in question.

Also, the application of the legal provisions to the particularities of the case brought before the court is the exclusive attribute of the courts, called to apply the law to the factual situation that characterizes each case, which exceeds the rigors and purpose of the appeal mechanism in the interest of law.

For these reasons, the High Court rejected as inadmissible the appeal in the interest of the law because, on the one hand, it tends to an interpretation that adds to the text of the law, which refers to the application of the law by establishing issues of fact, and not of law and, on the other hand, because it tends to deviate from the purpose of the mechanism of unification of the case-law represented by the appeal in the interest of the law.

litigation and arbitration - legal changes published in January 2021

The Decision of the European Court of Human Rights dated 6 October 2020 ruled in Giurgi against Romania Case (Application no. 40.124/13) was published in the Official Gazette, Part I no. 44 dated January 14, 2021 and it is applicable from the same date. The application is based on

claims of EUR 120 in title of compensation for the applicant's pecuniary damage, which is the equivalent value of the fine imposed on the applicant, as well as compensation for the non-pecuniary damage of EUR 300, incurred to challenge the non-criminal fine imposed for public order disturbance. While the applicant was returning home through an area where there was taking place an unsanctioned anti-government demonstration, he was imposed a fine of Lei 500 by a gendarme who took the applicant for a participant in the unsanctioned demonstration. Therefore, the European Court of Human Court decided as follows: a) the respondent State must pay the applicant the sum of EUR 300 within three months, to be converted into the respondent State's currency at a rate valid on the payment date, plus any sum that may be payable in title of tax for this sum; b) from the expiry of that period until payment is made, these sums shall be subject to simple interest, at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

The Decision of the European Court of Human Rights dated 29 September 2020 ruled in the Dimitrie Dan Popescu against Romania Case (Application no. 39.480/03 and 24 other applications) was published in the Official Gazette, Part I no. 40 dated January 13, 2021 and it is applicable from the same date. The applications concern the applicants' impossibility to exercise their

property rights, acknowledged by the domestic courts, over certain immovable properties nationalized by the State during the totalitarian communist regime, seeing as the respective assets were sold by the State to tenants living in them. Albeit the applicants had obtained final and unchallenged judgments, they could not reacquire possession over the immovable properties, nor could they be paid compensations for loss of property. Thus, the European Court of Human Court held that Article 1 §1 of Protocol 1 had been violated and ruled as follows: a) the respondent State must give back the respective immovable properties, within three months; b) in the event of failure to do so, the respondent State shall be ordered to pay, within the same time-limit of three months, the sums indicated in the table of the Judgment (approximately Euros 2,880,000); c) in any case, the respondent State must pay the applicants, within the same time-limit of three months, the sums indicated in the appended table, plus any sum which may be payable to the applicants in title of tax for such sums to cover the non-pecuniary damage and court fees and expenses; d) the sums indicated in the table shall be converted to the respondent State's national currency at the exchange rate applicable on the payment date, except for sums awarded to the applicants in the applications no. 29.712/05, 41.411/05, 27.808/07, 46.902/07, 61.539/08, 53.085/09 and 35.610/14; e) that, from expiry of the mentioned period until payment is made, these sums shall be subject to simple interest, at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Decision of the High Court of Cassation and Justice no. 68/2020 on the examination of the referral submitted by Bucharest County Court – Criminal case Division I in the case file no. 24.527/302/2019, was published in the Official Gazette, Part I no. 99 dated January 29, 2021 and it is applicable from the same date.

The High Court granted the referral submitted by Bucharest County Court – Criminal case Division I in the case file no. 24.527/302/2019 in order to deliver a preliminary judgment so as to release a point of law and consequently, determined that, in the interpretation and application of the provisions of Article 452 paragraph (1) of the Criminal procedure code, an application for review relying upon the provisions of Article 453 paragraph (1) letter f) of the Criminal procedure code, may be brought against a final criminal sentence as well, ruled in order to settle an application based on the provisions of Article 595 of the Criminal procedure code.

Decision of the High Court of Cassation and Justice no. 54/2020 on the examination of the referral submitted by the High Court of Cassation and Justice - Civil case matters in the case file no. 21.840/3/2016, in order to make a preliminary ruling was published in the Official Gazette Part I no. 63 of January 20, 2021 and is and it is applicable from the same date.

The High Court granted the referral submitted by the Civil matters division I in the case file no. 21.840/3/2016 and determined that, in the interpretation and application of the provisions of Article XVIII paragraph (2) second thesis of Law no. 2/2013 on certain measures for relieving courts and to prepare the implementation of Law no. 134/2010 on the Civil procedure code, as amended, judgments ruled in the applications on the repair of damages caused by judicial errors, respectively judgments ruled in the applications lodged under Article 538 of the Criminal procedure code are not subject to second appeal.

Decision of the High Court of Cassation and Justice no. 25/2020 on the examination of the appeal in the interest of the law submitted by the Leading Board of Bucharest Court of Appeal was published in the Official Gazette, Part I no. 31 dated January 12, 2021 and it is applicable from the same date.

The High Court granted the referral submitted by the Leading Board of Bucharest Court of Appeal relating to the settlement of appeal in the interest of the law and, consequently, held that in the interpretation and unitary application of the provisions of Article 55 of the Emergency Government Ordinance no. 80/2013 on judicial stamp duties, as subsequently amended and supplemented, sets out that for trials begun under the rule of Law no. 146/1997 on judicial stamp duties, as subsequently amended and supplemented, with regard to all the applications submitted within them, ancillary, incidental and procedural occurrences applications, as well as ordinary and extraordinary remedies, the provisions of this law with regard to the judicial stamp duty are applicable, not those of the Emergency Government Ordinance no. 80/2013.

public procurement - legal changes published in January 2021

Instruction of the National Agency for Public Procurement no. 1/2021 on amending the public procurement contract/ sectoral procurement contract/ framework agreement was published in the Official Gazette, Part I, no. 56 of January 19, 2021, entering into force on the same date.

The National Public Procurement Agency considered it was necessary to issue a new Instruction to provide the market with more clarity, predictability, rigor and, above all, more examples of contractual amendments, within the limits of existing national and European legislation.

Through the Instruction:

- the provisions contained in three instructions previously issued on the matter of contractual amendments (no. 3/2017, no. 2/2018 and no. 1/2019, these being repealed) are summarized in the form of a single instruction;
- **specific examples** are presented for each type of contractual amendment, so as to ensure a unitary approach and avoid blockages in the performance of contracts;
- the **register of contractual amendments** is introduced at the level of the contracting authorities/ entities, thus ensuring the implementation of new legislative provisions, respectively the publication in SEAP of all the contractual amendments during a public/ sectoral procurement/ framework agreement;
- **the way of formalizing the contractual amendments** is clarified, being established rules regarding the use of the various ways of recording the amendments of the contract (with or without concluding an addendum);
- the regime of **non-substantial amendments regardless of value** is clarified, as in the case of replacing the subcontractor/ introducing a new subcontractor, the situation of extending the duration of contracts/ duration of the award procedure [according to para. (1) letter e) of art. 221 of Law no. 98/2016], by highlighting the circumstances that may fall within the provisions of this article;
- the possibility of adjusting the price is introduced even in the situation where there are contractual provisions that establish that the **price is firm**, the Instruction addressing the conditions under which the price of the contract can be adjusted;
- new provisions are introduced regarding the possibility to cover the increases generated by the increase of the minimum gross salary, including the incidental labour for the personnel involved - both in **direct and indirect expenses** - subject agreed with the point of view of the external public auditors of the Court of Auditors involved in control actions;
- are exemplified the most common cases of contractual amendments (the category of those with low value, such as: the need to implement optimizations related to the object of the contract; supplementation of products/ services/ works; adaptation of the technical project to the reality on the ground; introduction of new products/ services/ similar works);

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- **new examples of review clauses** are introduced for various situations and clear rules for choosing the indices used in the adjustment formulas;
- a **detailed example of the calculation of the revised price** of the contract is given in case several types of contractual amendments take place, and the contract provides an adjustment formula;
- a **checklist** is provided (Annex 1) to support the contracting authorities/ entities to identify the circumstances related to a certain type of non-substantial amendment, but also the threats that may compromise the initiation of the amendment process;
- a special section on amending contracts/ framework agreements awarded on the basis of the G.E.O. no. 34/2006 is introduced.

For additional details on this material, please do not hesitate to contact us.

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